which means that in any one year, nearly one in three wireless customers switch to a competitor.[20] The deployment of new PCS systems which directly compete for customers of existing cellular carriers has forced all CMRS carriers to work even harder to retain customers, who now benefit from having not one but three or more CMRS carriers in most markets to choose from.

Carriers invest significant resources (often several hundreds of dollars) in signing up each new customer, including advertising, sales commissions, and the costs of retail stores. They subsidize handset costs to attract more customers, a practice the Commission found to be pro-competitive.[21] Given the ease and frequency with which customers switch carriers, and the increasing variety of CMRS carriers they can choose among, CMRS carriers have enormous financial incentives to retain or win

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[20] E.g., Telephone Number Portability, CC Docket No. 95-116, Petition for Forbearance of the Cellular Telecommunications Industry Association, Comments of Primeco Personal Communications, February 10, 1998, at 9-10 (citing Anderson Consulting study, which concludes that "wireless customers churn at annual rates of 30% . . . and that such rates may increase beyond 40% in the future").

[21] Bundling Order, supra.

back customers who decide to switch.[22] When a carrier learns that a customer is leaving, the carrier will invest extensive effort to retain that customer by, among other things, offering incentives, which often include lower prices, not to switch.[23]

These retention and win-back programs are intensely pro-competitive. They place the customer in the attractive position of having two competitors directly vying for its business at the same time, and being able to leverage one against the other. A carrier which is threatened with the loss of a customer will often seek to negotiate a lower-priced package of services. The customer can then take that offer, turn to the competing carrier and ask that it meet or beat that offer, thereby securing even further benefits from carriers' retention efforts. This vigorous competition has a direct downward impact on prices.

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[22] Telephone Number Portability, supra, Comments of Telecommunications Resellers Ass'n at 11 (noting that "'churn' is 'competition'" and that the CMRS market can be characterized by "'the fury of churn' and the 'fierce battle to gain and retain elusive customers.'").

[23] The significant investment in signing up new CMRS customers, the level of competition among both existing and new CMRS entrants, and the level of churn are far higher in the mobile services market than in landline markets, thereby making the anticompetitive impact of Section 64.2005(b)(3) particularly serious for CMRS.

The Commission has repeatedly applauded steadily declining CMRS prices, and has pointed to them as evidence of increasing competition.[24] CMRS retention and win-back programs contribute significantly to the declines in CMRS prices that the Commission has championed. These programs, however, do not work without access to a customer's CPNI. Review of the customer's records is necessary so that the carrier can identify what particular offerings and pricing packages best fit the customer's usage, and might induce the customer to remain or return.

Section 64.2005(b)(3) cripples these pro-competitive customer retention efforts, by effectively prohibiting a carrier from accessing customers' CPNI in order to persuade them not to leave or to come back. Although the Order permits such access after obtaining the customer's affirmative consent, in practice this is unworkable. A carrier which is forced to read the customer the required litany of rights and obligations before it can access CPNI and before it can even advise the customer of the purpose of the call obviously stands little chance of

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[24] Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 12 FCC Rcd 11266 (1997). That report proclaimed, "The Commission has continued systematically to remove regulatory barriers in order to facilitate competition." Id. at 11274. Yet here the Commission has added a barrier that directly impedes competition.

retaining the customer. Win-back efforts using direct mail would be precluded altogether, unless written or separate verbal authorization is first solicited and given. But such efforts are infeasible (particularly given the few weeks before the rule takes effect) and would impose major costs on CMRS carriers that will divert resources from pro-competitive retention efforts.

Since no single CMRS carrier has market power, the CPNI win-back rule is an overtly anticompetitive restraint of trade. Such restraints must have a compelling rationale to justify their harm to competition. The Order does not supply one. There is no evidence that permitting access to CPNI in this situation would in any way conflict with customers' privacy expectations. To the contrary, use of former customer information as part of "welcome back" or similar win-back campaigns is prevalent in many industries as a successful competitive strategy.[25]

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[25] Just this week, for example, the Wall Street Journal reported on the many win-back campaigns by catalog retailers: "Land's End Inc., for one, is digging into its mailing list and attempting to reactivate old customers. . . . The company is focusing the mailings to appeal to those customers' shopping tastes based on past practices." "Catalog Retailers Launch Titles in Quiet Quarter," The Wall Street Journal, April 20, 1998, at B11E.

C. Deferral Will Cause No Harm, But Failure to Change the Effective Date Will Injure Both CMRS Consumers and CMRS Providers.

CTIA seeks a change in the effective date of Sections 64.2005(b)(1) and (b)(3) to CMRS only for 180 days (until November 24, 1998). This time should enable the Commission to act on petitions to reconsider or forbear from these two rules. It is the rules, not this brief delay, that will harm CMRS consumers and carriers, by impeding competition among carriers and by depriving customers of the benefits of that competition. Even were the Commission at some later date to modify these rules, there would be no mechanism to recoup the losses to carriers or to competition that would result from enforcing the current compliance deadline.

No carriers or customers will be injured by grant of this request. The need for deferral is underscored by the fact that CTIA, which represents hundreds of CMRS carriers, large and small, cellular and PCS, seeks this relief on behalf of all its members. Because customers have benefited from the marketing practices that the rules restrict, they will also not be injured. There is no harm to customer privacy expectations, since, again, CMRS providers have not until now been prevented from using CPNI. Deferral would not open up any customer

information for use by CMRS carriers that has previously been shielded against use.[26] In addition, CTIA seeks only a change in the effective date, not an indefinite stay. These factors warrant deferring the effective date of Sections 64.2005(b)(1) and (3) as to CMRS.

V. SECTION 222 DOES NOT REQUIRE THE DISRUPTION TO CMRS COMPETITION THAT THE RULES WOULD CAUSE.

The Commission does not address the impact of the rules on CMRS customer expectations and competition, because it decides that Section 222 leaves it no choice but to impose these rules on CMRS. It is not necessary, however, to interpret Section 222 to prohibit the integrated CMRS marketing and customer retention practices discussed above. Rather, the statute can be construed to achieve Congress's intent without causing the severe disruptions that the new rules will create.

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[26] The only previous CMRS-related limit on CPNI use prevented a BOC local exchange carrier from sharing CPNI about its customers with the BOC's cellular affiliate unless it made that information available on a non-discriminatory basis. 47 C.F.R. § 22.903(f). That rule, which the Order repealed, did not require customer approval before the CPNI was provided to the cellular affiliate, and neither it nor any other rule restricted the cellular carrier from using its own customers' CPNI to sell customers CMRS products and services.

A. Section 222 Does Not Prevent a CMRS Carrier From Using CPNI to Market Wireless Equipment.

New Section 64.2005(b)(1) prohibits the use of CPNI to sell CPE without prior customer approval. The Commission based this rule not on public interest or policy considerations, but solely on its reading of Section 222, which it asserted compelled the prohibition. It found that CPE was neither a "telecommunications service" under Section 222(c)(1)(A), nor a "service[ ] necessary to, or used in the provision of such telecommunication service" under 222(c)(1)(B), and thus that the "unambiguous" language required restricting CMRS providers from using CPNI to market CMRS-related equipment. Order at ¶ 75.

The Order adopts an overly literal and unnecessary interpretation of these provisions to outlaw practices that the Commission has long held benefit competition and wireless customers.[27] These provisions do not mandate adoption of Section 64.2005(b)(1). To the contrary, there are numerous reasons why

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[27] The D.C. Circuit recently reversed the Commission for adopting a "wooden" definition of a term in Section 275(a)(2) of the 1996 Act. There too, the Commission believed its interpretation was compelled by the literal language of the provision. There too, the Commission had not considered the broader public interest goals and policies of the Act or the practical problems its definition would create. Alarm Industry Communications Committee v. FCC, 131 F.3d 1066 (D.C. Cir. 1997).

Section 222(c)(1) allows CMRS providers to market wireless equipment in conjunction with transmission service.

1. The Order admits that there may be public interest reasons to permit marketing of CPE. At the outset, the Order appears to adopt inconsistent rationales. It rejects arguments that the use of CPNI to market CPE should be allowed on policy grounds by asserting that the Act left it no room to do so: "We give meaning to the statutory language, and find no basis to extend the exception in section 222(c)(1)(B) to include 'equipment.'" Order at ¶ 71. But it later states, "It nevertheless may be appropriate in the future for us to examine whether the public interest would be better served if carriers were able to use CPNI, within the framework for the total service approach, in order to market CPE." Id. at ¶ 77. This conflicts with the Order's earlier assertion that Section 222 brooks no public interest basis to permit the use of CPNI to sell CPE. Since the Commission concedes there may be public interest benefits to the use of CPNI to market CPE, it should have assessed them.

2. Provision of CMRS equipment is integral to customers' wireless service. The Order assumes that CMRS-related phones, pagers and other equipment should be classified as "CPE" and thus placed on the opposite side of the CPNI "wall" from "service." This demarcation between equipment and service

departs from both technical reality and regulatory history of mobile services.[28] In CMRS, the provision of equipment and transmission capability are intertwined and inseverable. The equipment operates as a transmitter and/or receiver that is programmed for the particular transmission service the customer subscribes to. It is an essential part of the overall "service" provided to customers, and is clearly "necessary to, or used in, the provision of" CMRS. Section 222(c)(1)(B) thus should be read to encompass such equipment. Landline CPE, in contrast, has no inherent transmission capability.

3. Mobile handsets are part of a CMRS provider's radio service for which it is licensed under Title III. Handsets are included in the CMRS provider's Title III radio service license, and in this regard as well are part of the provider's "service." The Order does not discuss the distinctions between Title II and

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[28] The Order also incorrectly assumes that mobile handsets should be treated as "CPE." But Section 3(46) of the 1996 Act defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route or terminate telecommunications" (emphasis added). CMRS handsets are not "employed" on particular "premises." Unlike landline CPE, which is affixed to the premises of a specific office or residence, mobile equipment can and does move anywhere. The Order failed to consider whether the 1996 Act's new definition of CPE encompasses mobile handsets.

Title III services, nor does it acknowledge that CMRS providers are not simply "carriers" but are also "licensees." This dual role of a CMRS provider, and its duties under Title III as well as Title II, justify construing Section 222(c)(1) to allow CMRS providers to integrate their marketing of transmission services and related equipment.

Each CMRS provider must obtain a radio service license under Title III of the Act that encompasses CMRS equipment. That license authorizes the provider to operate a system of "land stations," generally antennas at fixed locations such as on towers or buildings, and "mobile stations," the handsets or mobile phones used by subscribers. The entire system of land and mobile stations constitutes the Title III "service" under the Act and the Commission's own rules. CMRS handsets are fundamentally different from a landline phone, since landline CPE is not a transmitter subject to Title III and is not that carrier's responsibility. See 47 C.F.R. Parts 15 and 68.

The Order distinguishes Title II "telecommunications services" and CPE, but this is a distinction grounded on Title II landline concepts. It fails to consider the separate Title III service definitions, which clearly encompass mobile equipment. That equipment is not only part of the Title III

"service" for which the CMRS provider holds a license; it must be maintained as a condition of that license.[29]

Rather than addressing these key differences between landline CPE and CMRS-related equipment, the Order assumes that the traditional landline-based CPE vs. service dichotomy is required for CMRS. Given, however, the regulation of CMRS-related equipment as part of the wireless carrier's licensed Title III service, Section 222(c)(1)(B) can and should be read to include such equipment within the term "services."

4. If inside wiring is a "service," so is CMRS equipment. The Order (at ¶ 78) held that inside wiring installation and maintenance is a "service" under Section 222(c)(1)(B). This holding cannot be reconciled with the refusal to treat mobile handsets as part of mobile service. Although the Order declared that the term "service" necessarily excludes any equipment, it conversely held that inside wiring (which includes equipment) qualifies as a "service." In both cases, equipment and service

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[29] For example, Section 22.927, one of the rules governing cellular licensees, states: "Mobile stations that are subscribers in good standing to a cellular system . . . are considered to be operating under the authorization of that cellular system. Cellular system licensees are responsible for exercising effective operational control over mobile stations receiving service through their cellular systems."

are intertwined. To the extent that the Order placed inside wiring within the scope of a Section 222(c)(1)(B) "service" because it is "necessary to or used in" a telecommunications service, this is equally true of CMRS equipment. Inside wiring is no more necessary to a landline subscriber's ability to receive landline service than a handset is to a CMRS subscriber's ability to receive mobile service.

The Commission noted that a carrier's provision of inside wiring includes "keeping the telecommunications service in working order." Order at ¶ 79. CMRS carriers also program and maintain mobile handsets to keep their service in working order. Every phone must be programmed with a unique ESN, MIN or other data unique to the customer. The CMRS carrier "services" this equipment just as it "services" inside wiring. Ensuring that the call reaches the customer by keeping in good repair the last link in mobile communication is conceptually identical to repairing the last link in landline communication.

CMRS equipment is more closely tied to service and customer expectations than is inside wiring. The CMRS provider is by rule responsible for handsets, advises customers how to use them, repairs them, and reprograms them to receive new features or to change the customer's mobile number. Because it is the customer's own carrier who provides these functions, customers

expect that their carrier will contact them about equipment. Landline carriers, by contrast, have no obligations to provide inside wiring installation and repair; customers can and do use other vendors. Customers' expectations that their landline carriers will contact them about inside wiring contracts are if anything less than that a CMRS carrier will contact them about replacing or upgrading their handset. Yet the rules reach the opposite result by permitting the use of CPNI to sell inside wiring but not CMRS handsets.

B. Section 222 Does Not Prevent a CMRS Carrier From Using CPNI to Market Related Services.

Section 64.2005(b)(1) also prohibits the use of CPNI to sell "information" services without prior customer approval. Again, the Commission based this rule not on public interest or policy considerations, but solely on its reading of Section 222, which it asserted compelled this result. It found that "information" services were not "services necessary to, or used in the provision of such telecommunication service" under 222(c)(1)(B). Order at ¶ 75. This finding is also not required by the statutory language.

1. The Order improperly grafts landline service distinctions onto CMRS. The Order does not start with any record evidence on customers' expectations as to what mobile

services are functionally related and thus can be sold using CPNI under Section 222(c)(1)(B). Rather, it draws a line between "basic" or "adjunct to basic" as opposed to "information" services. These terms have never had any legal or practical meaning for mobile services. There has been no independent market of wireless "information" service providers, CMRS carriers have not had to distinguish among these services, and consumers have benefited from being advised about these advanced offerings by their CMRS carrier.

Nothing in Section 222 indicates that Congress intended the Commission to so radically change existing law by grafting these landline concepts onto wireless. Instead, the statute clearly intends that any distinctions the Commission makes among different services be based on customer expectations and privacy interests. The Commission followed this intent in finding that it should separate CMRS, local and long distance services in applying the statute. But there is nothing in the record that suggests that wireless customer expectations or privacy interests diverge at some line drawn between "adjunct to basic" and "information" services. The Order thus incorrectly severed CMRS "information" services from the scope of Section 222(c)(1)(B).

2. The term "used" means services that are functionally related to the underlying telecommunications service. The Order interprets Section 222(c)(1)(B) to exclude services that are not physically and simultaneously used with the telecommunications service. The more natural reading of the term "used," however, would include services which are functionally related to the underlying telecommunications service. As the Order notes, Section 222 is intended to limit the use of CPNI where customers have privacy expectations that their CPNI would not be used for unrelated purposes. Conversely, if customers relate those services, they would expect CPNI to be used to sell them. Given that the CMRS industry has always integrated offerings of all services that can be offered over mobile handsets, interpreting Section 222(c)(1)(B) to include CMRS-related information services would match customer expectations.

This reading of Section 222(c)(1)(B) would also be consistent with the Commission's premise for the lines it drew in permitting use of CPNI. That premise was that carriers could freely use CPNI where there was an "existing service relationship," because "the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship." Order at ¶ 23. This test,

which considers the overall carrier-customer relationship in functional terms, is satisfied by examining what services have been offered and purchased together. In CMRS, that includes "information" services.

3. "Information" services are no less "used" in CMRS than directories are "used" in landline service. CTIA's reading of Section 222(c)(1)(B) is also consistent with Congress' inclusion of directories in that provision as an example of services that are "used" in the underlying telecommunications service. A directory of landline subscribers and their phone numbers is functionally related to and helpful in customers' use of land-line services, but it is certainly not "used in" that service as the Commission has narrowly construed that term. The Order excludes CMRS information services from Section 222(c)(1)(B) because they are not physically used in the actual provision of the underlying service, but neither are phone directories physically used in the provision of landline service. Directories are even less related to the communication service than CMRS voice mail, which at least uses the radio service. Congress's reference to directories confirms that the proper reading of Section 222(c)(1)(B) is to permit the use of CPNI to market services that are related to the underlying service, and wire-

less information services are, for reasons of technology and customer convenience, closely related to CMRS.

C. Section 222 Does Not Prohibit Customer Retention and Win-back Efforts Using CPNI.

New Section 64.2005(b)(3) prohibits a CMRS provider from using CPNI to retain or win back customers who have advised the provider that they are switching to a different carrier. This flat prohibition, as noted above, frustrates the most vigorous competition among wireless providers – when they are vying for the same individual account – and deprives customers of the clear benefits of that competition. Other serious issues are raised by this rule:

1. The Commission's construction of Section 222(c)(1) is unwarranted. It found that, because this provision allows the use of CPNI without prior approval only for the "provision" of service, efforts to retain a customer are not allowed because they do not involve the "provision" of service. But nothing in Section 222(c)(1) compels this reading. Here again, the Commission reads prohibitions into the statute that are not there. As discussed in Part IV of this Request, when a customer contacts a carrier to terminate service, the carrier often seeks to keep that customer by offering new services or different price plans. The carrier will access the customer's CPNI to

determine how to seek to retain that customer. The purpose of customer retention is the "provision" of service.

2. The rule lacked the notice required by law. Section 64.2005(b)(3) was invalidly promulgated because the Commission did not provide notice that this prohibition was being considered. The Notice of Proposed Rulemaking was silent as to any rule that would affect customer retention efforts. As a result, no party filed comments or reply comments advocating or opposing such a rule, and the Order (at ¶ 85) offers only three sentences in explaining it. The Administrative Procedure Act is violated when, as here, an agency imposes a new rule without giving any advance indication that such a rule was being considered.[30]

3. There is no record support for the rule. There is also no information in the record that would support the Commission's bald claim that use of CPNI to retain a customer "is outside of the customer's existing service relationship." Order at ¶ 85. There is nothing to show that privacy expectations would be harmed or undermined by the use of CPNI in retention efforts.

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[30] See McElroy Electronics Inc. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993)(FCC decision reversed because it provided inadequate notice).

To the contrary, customers would likely be surprised if their service provider failed to make an effort to retain them upon learning of their decision to switch to a competitor. The rule, however, improperly erects a rigid barrier around the customer's CPNI – even though CPNI would be used to offer incentives to retain the customer that would benefit the customer and promote competition. At a minimum, the rule was improperly promulgated given the lack of any record evidence that could support it. [31]

VI. THE COMMISSION SHOULD CLARIFY THAT CPNI DOES NOT INCLUDE CUSTOMER NAMES AND ADDRESSES AND THAT THE WIN-BACK RULE WOULD APPLY ONLY TO PAST CUSTOMERS.

In acting on CTIA's request to defer the effective date of Sections 64.2005(b)(1) and (3), the Commission should also clarify the Order in two respects.

1. Definition of CPNI. The Order incorporates the statutory definition of "CPNI" into new Section 64.2003(c). Some of CTIA's member companies have raised the concern as to whether the Commission considers customer names and addresses to

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[31] An agency must "examine the relevant data and articulate a rational connection between the facts found and the choices made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1993). Here there was no relevant record data at all, let alone the requisite "rational connection" between that record and the rule.

be included within this definition. The Commission should clarify that "CPNI" does not include the name and billing address of a CMRS provider's customer.

Section 222(f)(1) defines CPNI to include "(A) information that relates to the quantity, technical configuration, type, destination and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier solely by virtue of the customer-carrier relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." The privacy concerns of Section 222 focus on customer's interests in information about the type and amount of services they purchase, not to the fact that a customer is a subscriber. Because customers do not have a similar expectation of privacy in the mere fact that they are a subscriber, there is no privacy goal that would be impaired by this clarification. By contrast, defining CPNI to include the subscriber's name and address would restrict carriers in communicating broadly to their own subscriber base, thereby impairing customers' interest in learning about new offerings.

2. Scope of Win-Back Rule. Section 64.2005(b)(3) does not appear to apply until a customer is no longer receiving service from its original carrier, because it refers to the use

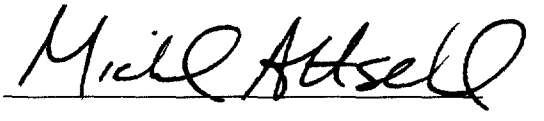
of a "former customer's CPNI." Thus, if a carrier learns a customer intends to change to a competing provider but has not yet terminated the existing relationship, the rule would permit customer retention and win-back efforts. The text of the Order, however, creates an ambiguity by suggesting that the new rule may apply to "soon-to-be-former customers." Id. at ¶ 85. That broader interpretation of the rule would constitute an even more serious anticompetitive restraint by preventing a carrier from attending to its customers and competing to retain them at a critical time, when customers are about to terminate service. Customers often leverage their ability to switch carriers by seeking progressively more attractive pricing, and carriers need to access CPNI in order to prepare competitive responses. Barring the use of CPNI in that situation would subvert that competitive process. There is, moreover, no privacy concern at issue when a customer still has a relationship with his or her existing carrier.

Thus, in addition to deferring the effective date of Section 64.2005(b)(3), the Commission should also clarify that this rule would even then only apply to a carrier's use of CPNI of past customers in order to target those customers, and that it does not apply with regard to customers who are still receiving service.

VII. CONCLUSION

For the above reasons, CTIA requests that the Commission immediately defer the effective date of Sections 64.2005(b)(1) and (b)(3) for 180 days, to the extent that they apply to the provision of CMRS-related equipment and services. The Commission should also clarify the scope of the new rules as they apply to CMRS.

Respectfully submitted,



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